Zakaria bin Jaafar v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors and another application

HIGH COURT (JOHORE BAHRU) - CRIMINAL APPLICATION NOS 44-2 AND 44-4 OF 1989
MOHTAR ABDULLAH JC
9 JULY 1989

Administrative Law - Habeas corpus - Conditions precedent to making of detention order - Whether Minister acted prejudicially in considering recommendation of advisory board

Preventive Detention - Dangerous Drugs (Special Preventive Measures) Act 1985 - Whether extension order amounted to new ground for detention - Whether extension order can cover a period exceeding the duration of parent Act - Whether Minister acted prejudicially in considering recommendation of advisory board - Federal Constitution, arts 5(1) & 151(1)(a) - Dangerous Drugs (Special Preventive Measures) Act 1985, ss 1(3), 1(5)(b)(i), 6(1), 9, 10, 11A(1) & 11A(3).

Both applicants were arrested under the Dangerous Drugs (Special Preventive Measures) Act 1985 for two years each. Subsequently, pursuant to s 11A(3) of the Act, the Deputy Minister of Home Affairs issued an extension order to detain them for a further two years. The applicants challenged the validity and legality of their detention on the following grounds:

(1) The advisory board was not empowered to, and wrongly recommended that the applicants' detention be extended for a further two years, and that the Minister wrongly considered this report.
(2) There has been no compliance with art 151(1)(a) of the Federal Constitution as the applicants were denied the right to make representations against the extension order.
(3) The Minister wrongfully denied the applicants a right to make representations even though he represented to them that they had such a right.
(4) Article 5(3) of the Federal Constitution had been contravened in that the applicants were not informed of the grounds of their arrest 'as soon as may be'.
(5) There was a contravention of s 10(2) of the Act in that there was no communication of the decision or direction of the Yang di-Pertuan Agong to the Minister regarding the recommendation of the advisory board.

The second applicant further argued that the extension order was illegal and invalid because it extended his detention beyond the life-span of the Act itself and it was therefore contrary to art 5(1) of the Federal Constitution.

Held, dismissing the applications:

(1) The advisory board is statutorily bound to review the applicants' case and submit a written report of such review. The mere fact that the board exceeded its power by including a recommendation for extension is not fatal and does not ipso facto taint the decision of the Minister.

(2) Whether or not the Minister acted prejudicially in taking into account the board's report containing the offending recommendation can only be answered by looking at the facts and circumstances of each case.

(3) Under s 11A, the Minister has the power to decide on the basis of facts available before him, and direct that any detention order be extended. In his affidavit, the Minister stated that he did not consider himself bound by the board's recommendations and that he also received reports and information from the police seeking extension of the detention orders. All in all, the Minister made his own decision to extend the detention. The court cannot go behind the Minister's subjective satisfaction which is so unequivocally stated; neither can such satisfaction be impugned by any extraneous matter that has crept into the report of the board.

(4) There is in law and fact only one detention order. The extension order is not a new detention order, but merely an extension of the original existing detention order. Article 151(1)(a) of the Constitution applies only when fresh grounds have been considered against the applicants and as such, there was no infringement of this article. Since there was no new detention order, the applicants accordingly do not have a right to representation even if the Minister represented to them that they had such a right.

(5) The argument that the applicants were not informed of the grounds of their arrest 'as soon as may be' was rejected as it had no basis in fact.

(6) There was no contravention of s 10(2). The secretary to the board confirmed that the Yang di-Pertuan Agong confirmed the detention order. If the detention order was invalid in the first place, the Yang di-Pertuan Agong's confirmation will not save it. The fact that the detention orders were extended implies their confirmation by the Yang di-Pertuan Agong. This is to be distinguished from s 8(1) of the Internal Security Act of Singapore where the President's satisfaction is a condition precedent to the issue of the detention order.

(7) Section 1(4) of the Act states that the Act may, by resolution of both Houses of Parliament, be extended for a further period as may be specified in the resolution. Although Parliament has yet to pass such a resolution, they are empowered to do so before its date of expiry. Furthermore, s 1(5)(b)(i) provided categorically that upon the expiration of the Act, any order under s 6 or s 7 shall cease to have effect and the applicant will accordingly have to be released if Parliament does not extend the duration of the Act. There was accordingly, no contravention of art 5(1) of the Constitution.

[*Editorial Note*: The applicants have appealed to the Supreme Court vide Civil Appeal No 05-60 of 1989.]

Cases referred to

1 *Ng Choon Mon* v *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* Seremban High Court Criminal Application No 45-60 of 1988 (unreported) (distd)
2 *Chua Teck* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1989] 3 MLJ 118 (distd)
3 *Chng Suan Tze* v *The Minister of Home Affairs, Singapore & Ors* [1989] 1 MLJ 69 (distd)
4 *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 1(3), 1(5)(b)(i), 6(1), 9, 10, 11A(1), 11A(3).
Federal Constitution arts 5(1), 151(1)(a)
Internal Security Act (Cap 143, 1985 Ed) [Sing] s 8(1)

Teh Poh Teik for the applicants.
Abu Samah Nordin (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Mohtar Abdullah JC: These two habeas corpus applications were heard together with the consent of all parties concerned. For ease of reference, I shall refer to Zakaria bin Jaafar as the first applicant and Tan Poh Hee as the second applicant.

Both applicants were arrested and detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 (hereinafter referred to as 'the Act'). The first applicant was arrested on 29 January 1986. The detention order, dated 18 March 1986, signed by the then Deputy Minister of Home Affairs, Dato' Radzi Tan Sri Sheikh Ahmad, authorized his detention for a period of two years from 29 March 1986. The present Deputy Minister of Home Affairs, Dato' Megat Junid Bin Megat Ayob (hereinafter referred to as 'the Minister') subsequently directed that the duration of the detention order be extended for another period of two years with effect from the expiry of its then current duration, ie 28 March 1988.

The second applicant was arrested on 4 August 1986. The Minister issued the detention order, dated 1 October 1986, for a period of two years with effect from 2 October 1986 and subsequently extended its duration by another two years with effect from the expiry of its then current duration, viz 1 October 1988.

In his written 'skeletal points of argument' and his oral submission before me, counsel for the applicants repeatedly used the phrase 'extension detention order' loosely to refer to the direction of the Minister under s 11A(3) of the Act that the duration of the detention order be extended for such period specified by the Minister. What is in existence, in fact and in law, is one order of detention (made under s 6 of the Act), the duration of which is being extended for the further period of two years in the case of each applicant. A proper reading of the language and purport of s 11A bears this out. The Minister's direction for the extension of the detention order follows closely the language of s 11A. The Minister's direction is not a second detention order! In my view the loose use of the phrases 'extension detention order' (as used by counsel) and 'original order', 'the first detention order' and 'extension order' (as used in some of the earlier judgments of the High Court) may unfortunately give rise to the impression that there are, in the circumstances, two separate detention orders when the Minister invokes his power under s 11A. As I said earlier, in law and in fact, there is only one detention order. However, in the special circumstances set out in cl (3) of s 11A, where the direction for the extension of the duration of the detention order is made on different grounds or partly on the same grounds and partly on different grounds from the grounds on which the detention order was originally made, it is treated as if it is a fresh detention order - and the provisions of s 9 (representations against detention order) and s 10 (report of advisory board) 'shall apply to such direction *as if the direction were a fresh detention order*'. Section 11A confirms that in reality there is only one detention order, the duration of which can be extended on the same or on fresh grounds, with the additional safeguard of permitting the detained person to make representation against the fresh grounds alleged against him.

I shall now deal first with the submission made by counsel on behalf of the second applicant that the so-called 'extension detention order' is illegal and invalid in authorizing the detention of the second applicant until 30 September 1990, beyond the life-span of the Act which will expire on 14 June 1990. By Gazette Notification PU(B) 305/85, dated 12 June 1985, pursuant to s 1(2) of the Act, the Act was brought into force for a period of five years with effect from 15 June 1985. Unless otherwise extended by Parliament, the Act will lapse on 14 June 1990. In short, counsel argues that the Minister cannot direct that the duration of the detention order be extended up to 30 September 1990 when at the time of making the said direction, the Act is only valid up to 14 June 1990. Therefore, it is further argued, there is a violation of art 5(1) of the Constitution in that the detention of the second applicant was not made in accordance with law as the Act under which the second applicant is detained will no longer be valid law after 14 June 1990. Attractive though this argument might seem at first, it cannot hold water. Though, to date, Parliament has not yet passed any resolution pursuant to s 1(4) it can do so at any time before the Act lapses. Parliament, if it so desires, has still nearly one year to do so! In any event, the detention order would be valid and legally enforceable only during the period the Act remains in force. Section 1(5) is a clear answer to the second applicant's objection. Section 1(5) reads:

> (5) Upon the expiration of this Act
>
> (a) any person detained in police custody under section 3 shall forthwith be released; and
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> (b) any order under section 6 or 7 shall cease to have effect and
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> (i) the officer in charge of any place of detention shall forthwith release from custody every person detained therein pursuant to a detention order made under section 6 or 7; and
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> (ii) the Chief Police Officer of the State or Federal Territory within which a person subject to a restriction order made under section 6 or 7 resides shall forthwith inform such person that he has ceased to be subject to the restrictions and conditions imposed by such order.

This ground therefore fails.

The other grounds relied on by counsel on behalf of the first and second applicants are the same, and I shall deal with them together.

Common ground (a): That the advisory board wrongly recommended that the detention of the applicants be further

extended and that the Minister wrongly considered the report of the advisory board.

The advisory board is statutorily bound to review the applicants' case and submit a written report of such review to the Minister. The mere fact that the advisory board has exceeded its power by including a recommendation for the extension of the detention orders is not automatically fatal and does not ipso facto taint the decision of the Minister. Whether the Minister, in taking into account the advisory board's report which contains the offending recommendation, is acting in a manner prejudicial to any detained person is a question that can only be answered on the facts and circumstances of each particular case. It is the Minister's power under s 11A of the Act, on the facts available before him, to decide and direct that any detention order be extended. The Minister by his affidavit in each of these cases, has categorically affirmed as follows:

(a) that although the advisory board did recommend that the detention orders be extended, he did not consider himself bound by it under the law, nor was he prejudiced by it;

(b) that he received reports and information from the police seeking that the detention orders against the applicants be extended;

(c) that after careful consideration of all the reports and information submitted before him, he was satisfied that the applicants be further detained, and accordingly he directed that the duration of the detention orders in respect of each applicant be extended for a further period of two years commencing immediately upon the expiration of the then current duration of the respective detention orders on the same grounds on which the respective detentions order were originally made;

(d) that in the final analysis, though the various reports and information were submitted to him for consideration, he made his own decision to extend the detention orders against the applicants after being satisfied that the applicants' further detention was necessary on the same grounds on which the respective detention orders were originally made.

The court cannot go behind the Minister's subjective satisfaction so unequivocally stated, and neither can such satisfaction be impugned by any extraneous matter that has crept into the report of the advisory board. The issue here is the Minister's satisfaction before he exercised his powers under s 11A to extend the duration of the respective detention order - and on the evidence before this court the answer is crystal clear.

At this juncture, I respectfully refer to two recent decisions of the High Court in Seremban (*Ng Choon Mon* v *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors*[1]) and in Johore Bahru (*Chua Teck* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors*[2]) where the detention orders were invalidated on, inter alia, this ground. The facts in these two cases are quite different. In *Ng Choon Mon's* case[1] there were two conflicting affidavits by the same Minister as regards the application of his mind to the advisory board's report which contained the objectionable recommendation. It is clearly therefore distinguishable from the unequivocable affidavit of the Minister in these present cases. In *Chua Teck's* case[2] there was no categorical affirmation, as in the present cases that, inter alia, he was not bound by the advisory board's recommendation nor was he prejudiced by it. In the light of categorical affirmation by the Minister in his affidavit in the present cases, *Chua Teck's* case[2] is clearly distinguishable. This ground also fails.

Common ground (b): That there has been non-compliance with art 151(1)(a) of the Constitution in that the applicants were denied of their right to make representations.

The applicants complained that the authorities have failed to give them the opportunity of making representations against the so-called 'extension detention order'. As I had earlier pointed out, there is in law and in fact only one detention order against each applicant. In the case of the applicants, the direction of the Minister to extend the duration of the order was made on the same grounds on which their respective order was originally made. As I stated earlier, cl 3 of s 11A provides additional safeguards, within the spirit of art 151(1)(a) of the Constitution, to a detained person in case fresh grounds are to be considered against him. It is only right and fair that opportunity be given to a detained person to make representations against any fresh ground alleged against him. I hold that the denial to the applicants to make a second representation against their continued detention based on the same grounds is not an infringement of their right to make representations as guaranteed by art 151(1)(a) of the Constitution. Clause 3 of s 11A is not ultra vires the Constitution. This ground also fails.

Common ground (c): That once the Minister has represented to the applicants that they have a right to make representations, the Minister cannot by way of subsequent conduct or omission deny the applicants of this right.

The applicants complained that although a copy of the direction for extension of the detention order had been served on the applicants (which the second applicant refused to acknowledge), the applicants were neither given a copy of the notice informing them of their right to make representation nor a copy of the form to enable them to make the said representation. In the light of my findings on the common ground (b) above, this ground also fails. There is no right for the applicants to make representations against the Minister's direction that the duration of

the detention order be extended on the same grounds respectively. Even if the Minister has made such representation to the applicants (which in these cases is clearly not done by the Minister), the Minister cannot confer, and the applicants cannot acquire, any legal right which the law does not so provide.

Common ground (d): That there was a contravention of art 5(3) of the Constitution in that the applicants were not informed of the grounds of their arrest as soon as may be.

This objection relates back to the arrest of the applicants on 29 January 1986 and 4 August respectively. The first applicant (vide further affidavit by his wife affirmed on 29 April 1989) contends that he was not informed by the police of the reasons for his arrest until about five days later. The second applicant (vide his brother's further affidavit affirmed on 28 April 1989) contends that he was never informed by any police officer of the grounds of his arrest - 'when the applicant asked one of the arresting officers as to why he was arresting him, the said officer answered that the applicant ought to know'. It is also further contended that throughout his detention under police custody he was never informed of the grounds of his arrest. It is interesting to note that the first applicant's wife and the second applicant's brother both stated the wrong date of arrest of the applicants in their respective affidavits.

On the other hand, ASP Sulaiman bin Menga Din who effected the arrest of the first applicant affirmed that he informed the first applicant of the grounds of his arrest in the following words:

> Bahawa kamu ditangkap di bawah s 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 kerana kamu telah terlibat dalam aktiviti berhubungan dengan penglibatan dadah berbahaya dan adalah perlu bagi kepentingan awam kamu ditahan.

Similarly, Inspector Nordin bin Abdul who arrested the second applicant informed him of the grounds of his arrest in the same manner.

Counsel submits that the version of the arresting officers is not reasonable or probable. Unfortunately I cannot agree. These two arresting officers are senior police officers attached to the anti-narcotic division of the police headquarters at Bukit Aman. They are officers in a specialized agency dealing with drug cases, and it is quite reasonable and probable that they did recite the grounds of arrest in the manner as stated in their respective affidavits. In the absence of any evidence to the contrary (apart from the applicants' allegations through the affidavits of third parties - the wife and brother), I accept the version of the police officers, and accordingly hold that the applicants had been properly informed of the grounds of their arrest, and consequently there has not been any infringement by the detaining authority of art 5(3) of the Constitution. This ground also fails.

Common ground (e): That there is a contravention of s 10(2) of the Act in that there is no communication of the decision or direction of the Yang di-Pertuan Agong to the Minister regarding the recommendation of the advisory board.

Encik Khalid Bin Ahmad, the secretary of the advisory board, confirms that the advisory board:

(a) considered the first applicant's representation on 3 June 1986 and made its recommendation to the Yang di-Pertuan Agong on 6 June 1986;
(b) considered the second applicant's representation on 28 October 1986 and made its recommendation to the Yang di-Pertuan Agong on 31 October 1986.

In both cases, he affirmed that 'pursuant to the recommendation of the advisory board the Yang di-Pertuan Agong has confirmed the detention order made by the Minister under s 6(1) of the Act against the applicant'. Counsel contends that the above-mentioned statement by Encik Khalid is not admissible and offends the hearsay rule. And consequently there is no admissible evidence as to the communication of the Yang di-Pertuan Agong's decision or direction to the Minister as regards the confirmation of the detention order by the Yang di-Pertuan Agong.

In Singapore, under s 8(1) of the Singapore Internal Security Act the President's satisfaction is a condition precedent to the Minister's power to make a detention order, and consequently where a detention under s 8(1) is challenged, the respondent must, in addition to producing the detention order, also produce evidence of the President's satisfaction (see *Chng Suan Tze & Ors* v *Minister of Home Affairs, Singapore & Ors*[3]). The position is different in Malaysia. Under the Act, the Yang di-Pertuan Agong's satisfaction is not a precondition to the Minister making a valid detention order. Section 10(2) provides that on receipt of the advisory board's report the Yang di-Pertuan Agong may, in his discretion, give any direction, if he thinks fit, to the Minister. If the detention order by the Minister is invalid, even the confirmation of it by the Yang di-Pertuan Agong will not save it (see *Re Tan Boon Liat @ Allen & Anor*[4]). In the present cases, the fact that the detention orders were extended would imply their confirmation by the Yang di-Pertuan Agong. In the spirit of art 151(b) of the Constitution, if the Yang di-Pertuan Agong has not so confirmed the orders, the applicants would not continue to be detained under the Act. The confirmation of the detention order against each applicant is therefore not a crucial issue in the present habeas corpus proceedings, and Encik Khalid's statement on this point is quite unnecessary to the determination of the validity of the detention orders. Whether it is admissible or not, it does neither add to nor detract from the validity of the detention order issued by the Minister. I hold that this ground is without merit.

I have throughout been conscious of the basic principle that the grant of habeas corpus is of right and it is not within the discretion of the court to issue or not to issue the order if the applicants are unlawfully detained. The observation by Lee Hun Hoe CJ (Borneo), in *Tan Boon Liat's* case[4] is very explicit:

> I also said that 'it is part of the democratic process, even during national emergency, for the court to be vigilant that emergency expedients do not exceed the real necessities of the situation.' Further, preventive detention is a very serious invasion of personal liberty. Certain safeguards are provided by law for the protection of the subject and must be followed scrupulously. Where statutory requirements have to be complied with there must be strict compliance since it affects matters of such fundamental importance as the liberty of the subject. In *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184 at 186, Rigby J said to the effect that where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. Where the detention is not in accordance with law such detention is bad and the person is entitled to be released forthwith ... The function of the court is to interpret the law in accordance with established principles of construction.

I am satisfied that the detention of both applicants are in accordance with law and statutory procedure prescribed by law. Though the applicants are entitled to avail themselves of any technical defects which may invalidate the detention order, I find no technical defects which warrant the invalidation of the detention order against each applicant.

On the reasons stated above, these two applications are hereby dismissed.

Applications dismissed.

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